(2)

No. 94-941

In The

Supreme Court of the United States

October Term, 1994

WILLIAM DUNCAN, Warden,

Petitioner,

v.

ROBERT E. HENRY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a habeas corpus petitioner, who claims that the state court proceedings that led to his conviction violated his federal due process rights, has satisfied the exhaustion requirement of 28 U.S.C. § 2254 as interpreted by *Anderson v. Harless*, 459 U.S. 4 (1982), where the contentions he presented to the state court as constituting a miscarriage of justice under Article VI, Section 4½ of the California Constitution were the same as those he asserts in his habeas petition as constituting a federal due process violation and where the test for a miscarriage of justice under the state constitution is the same as the test for the federal due process violation.

2. Whether the Ninth Circuit was correct in holding that the federal due process rights of an accused are violated by admission of evidence that has no probative value and which is of such quality as necessarily prevents a fair trial, and if so, whether the court correctly applied this rule to the facts of this case.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert E. Henry respectfully submits that the Petition for Writ of Certiorari (hereafter the "Petition") should be denied for the reasons stated below. Respondent Henry adopts the Petition's statement regarding the Opinion Below, Jurisdiction and Statutory Provision.

STATEMENT OF THE CASE

To avoid confusion we refer to petitioner Duncan as the State and to Respondent Henry (the habeas petitioner) as Henry.

The statement of the case in the Petition leaves out evidence that drew into question the testimony of Andrew and fails to mention circumstances that increased the prejudicial effect of the Hackett testimony, most of which appears in the opinion of the Ninth Circuit (Appendix A, hereinafter the "Opinion") and is fully supported by the record. At the time that the molestation is alleged to have occurred, Andrew's parents were late and could arrive in any moment; the area outside Henry's office was bustling with people; and students passing by the window of Henry's office could see in through the drapes. [Opinion, pp. 9455 and 9462; RT 460(27)-464(6); 490(12)-491(13); 459(15-27); 480(19-28)]. The State was allowed to reopen its case in chief to present Hackett as the last witness, and the prosecutor emphasized his testimony in his closing argument. [Opinion, pp. 9455, 9463; RT 703(28), 704(28)-707(3)].

The Petition at page 4 says that Mrs. Ryan "concluded that the incident occurred in 1985." If the State means to imply that Mrs. Ryan testified to molestation, that is not so. She did not testify to having any knowledge of what occurred after Andrew entered Henry's office. Presumably the State means that if Andrew's testimony is believed, the incident to which he testified

occurred in 1985. [RT 465(25)-467(13)]. Finally, the Petition says, "Timothy's own account indicated that petitioner had molested him." (Petition, p. 5). Timothy did not testify. This is what Hackett said.

The Petition omits reference to the instruction the trial court gave respecting the Hackett testimony, which exacerbated the prejudice caused by the admission of the testimony. [Opinion pp. 9456-7, 9463-4; RT 896(12)-897(20)]. That instruction was in part as follows:

> "Such evidence was received and may be considered by you for the limited purpose of determining if it tends to show that the defendant's present out-of-court explanation (to the Yehs), if you find that it was made, of his conduct, is not genuine.
>
> When a defendant uses a similar explanation of his conduct on more than one occasion, his prior statements may, if found to have been made, show that his present explanation, if found to have been made, is not genuine."

Finally, the Petition recites much detail about the Yehs' testimony (Petition, pp. 4-5) that is not in the Opinion, but leaves out evidence that casts real doubt on that testimony. After their alleged conversation with Henry, both Dr. Yeh and Mrs. Yeh talked to many people in the community, including the archdeacon and the bishop of the diocese and the senior and junior warden of the church, about the accusations against Henry, but they never once mentioned their alleged conversation with him until they met with an investigator for the District Attorney's office more than one year later. [RT 408(13)-410(8); 418(22)-419(5); 435(11)-437(8);

442(23)-445(7); 696(10)-697(19)]. This was the same investigator who "interviewed" little Andrew five times concerning the testimony he would give in court [RT 684(13)-685(11)].

REASONS FOR DENYING THE PETITION

INTRODUCTION

1.

The Ninth Circuit's reasoning is entirely consistent with *Anderson v. Harless,* 459 U.S. 4 (1982). There is no question that the facts upon which the federal claim is based were before the state court. The State only questions whether the "substance" of the federal claim was presented. The Ninth Circuit correctly held that it was. The issue that was presented to and decided by the state court was identical to the issue that was presented to and decided by the federal court on Henry's petition. The state court had the opportunity to decide that issue and did so adversely to Henry. The District Court and the Ninth Circuit decided the same issue in Henry's favor. The decision does not, as the State suggests, allow state prisoners to by-pass state courts.

2.

The Ninth Circuit did not, as the Petition suggests, rule that state law error affecting trial result is a due process violation. It ruled that a federal due process violation occurred here because the evidence in question had no probative value, necessarily prevented a fair trial

and had a substantial and injurious effect or influence on the jury. This is clearly the test for determining whether admission of evidence constitutes a federal due process violation and depends in no way on whether admission of the evidence was a state law error.

3.

The Ninth Circuit correctly held that the test was met. In doing so it nowhere suggests that "evidence that tends to prove a material fact" can be a due process violation (Petition p. 9). It reasoned that the evidence had no such tendency and was highly prejudicial.

4.

The Questions Presented in the Petition suggest that this case raises some issue under *Teague v. Lane,* 489 U.S. 288 (1989), but the Petition does not develop the issue anywhere. In any case, there is no *Teague v. Lane* issue here.

ARGUMENT

A. THE NINTH CIRCUIT APPLIED THE ACCEPTED TEST AS TO WHEN ADMISSION OF EVIDENCE VIOLATES DUE PROCESS AND CORRECTLY FOUND THAT IT WAS MET IN THIS CASE.

The Ninth Circuit followed the rule that is generally accepted in the circuit and elsewhere on this issue – a due process violation occurred if the evidence in question had

no probative value, a fact the state court acknowledged, and if it was "of such (inflammatory) quality as necessarily prevents a fair trial" (Opinion, p. 9461), citing *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). This is in accord with *Moore v. Illinois*, 408 U.S. 786, 800 (1972), which holds that whether admission of evidence is a due process violation depends upon weighing the relevance of the evidence against its inflammatory effect. Indeed, the State championed the very same rule in its opening brief in the Ninth Circuit, where it said that *Moore* has the following meaning (Supplemental Appendix, App. 21-22):

> "(D)ue process is violated by the admission of prosecution evidence that has no probative value, but is so prejudicial that it is reasonably probable that exclusion would have produced a more favorable verdict. . . . "

The Ninth Circuit's holding on this issue did not create a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989), as the Petition (p. 22) contends. It simply applied existing precedent.

The State is also incorrect in arguing that the evidence in question was "logically relevant," and therefore the Ninth Circuit either misapplied the rule or made up a new one. The Hackett testimony was offered and admitted for the sole purpose of showing that when Henry denied the Yehs' accusations and explained them away, he must have been lying. The Hackett testimony could tend to prove this only if Henry's denial of and explanation in response to Hackett's accusation had been false, and that would have been so only if Henry had in fact

molested Hackett's son. There was no evidence that he had done so, and thus Hackett's testimony did not tend to prove anything at all. If Henry had not molested Hackett's son, his denial and exculpatory statement to Hackett was absolutely true, and the fact that he made the statement to Hackett would in no way draw in question the truth of his statement to the Yehs. The instruction concerning the Hackett testimony was particularly egregious. In essence it said:

> "Since Henry lied when he denied molesting Tim, you can infer that he lied when he denied molesting Andrew."

This was highly prejudicial as the Ninth Circuit observed (Opinion pp. 9462-3). Andrew's testimony was weak and was drawn into question by the surrounding circumstances. The *only* corroboration of Andrew was the testimony of the Yehs, and it was meaningless absent evidence that what Henry told them was a lie. There was no such evidence. The erroneous admission of Hackett's testimony and the erroneous instruction filled this vital gap. This enabled, indeed compelled, the jury to find that Henry lied to the Yehs when he denied their accusations and thus, in turn, lent credibility to Andrew's otherwise questionable testimony.

B. THE SUBSTANCE OF THE CLAIM HENRY PRESENTED ON HIS PETITION FOR WRIT OF HABEAS CORPUS WAS PRESENTED TO AND PASSED UPON BY THE STATE COURT, THEREBY SATISFYING *ANDERSON V. HARLESS*.

The state court held that the Hackett testimony had no probative value and should not have been admitted under state evidentiary law. It went on to hold, however, that the error was not cause for reversal because admission of the evidence, even in the light of the instruction that was given concerning it, was not "prejudicial." By this the court meant that in its view "it is not reasonably probable a different result would have been reached in the absence of the admission of this evidence." (Appendix D, p. 6.) Henry's habeas petition presented exactly the same issue to the federal court in two ways.

First, as we have shown in Section A above, to establish that the admission of the Hackett testimony was a due process violation, Henry had to show, in the State's own words, that it was "so prejudicial that it is reasonable probably that exclusion would have produced a more favorable verdict." This is the identical issue that was presented to and decided by the state appellate court. In the words of *Picard v. Connor*, 404 U.S. 270, 277 (1971), the "ultimate question for disposition" was "the same despite variations in the legal theory . . . . urged in its support."

This identity of issues surely satisfied *Anderson v. Harless*. The few analogous cases we have found agree. *West v. Wright*, 931 F.2d 262 (4th Cir. 1991), *reversed on other grounds*, ___ U.S. ___, 112 S. Ct. 2482 (1992); *Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983); *Daugharty v. Gladden*, 257 F.2d 750, 757-8 (9th Cir. 1958), *cited with approval in Picard v. Connor*, 404 U.S. 270, 278 (1971). These cases, like the case at bench, are in stark contrast to the facts in *Anderson v. Harless*, where the habeas petitioner had argued in state court that an instruction on malice permitted an inference that state law did not allow and then sought to argue on his habeas petition that the instruction relieved the prosecution of its burden to prove guilt beyond a reasonable doubt.

The State's argument (Petition pp. 17-18) about the effect of *Chapman v. California*, 386 U.S. 18 (1967), misses the point, even if *Chapman* were to apply to these proceedings (of which more later). A court does not get to the *Chapman* test until it has first found that a constitutional error has occurred. Where the claimed constitutional error is of the sort that is involved in this case, a finding that such an error did occur necessarily includes a finding that a different result would have probably been reached had the evidence been excluded. Once that finding has been made, there is no way that the error could be deemed harmless under *Chapman*, and so it becomes irrelevant. Thus, *Lesko v. Owens*, 881 F.2d 44, 49 n. 7 (3d Cir. 1989), says:

> "We note a certain overlap in analysis here, i.e., once there is a finding of a denial of a fair trial, it is difficult to envision such an error could be 'harmless.' We also note that not every court of appeals applies the harmless error analysis to this constitutional error." (citations omitted.)

In short, regardless of what *Chapman* may say, the habeas court had to decide the same issue that the state court decided.

For these reasons, *Chapman* has nothing to do with this case. This circumstance is unique to a case such as this one, where the court must examine and weigh all the evidence to determine if a constitutional error has been committed. In most cases this is not necessary. Thus in *Chapman* for example, the error lay in permitting the prosecution to comment on the silence of the accused. Having found that error to have occurred, the court then had to review all the evidence to determine if the error was prejudicial.

The second way in which the habeas petition presented to the federal court the same issue the state court decided arose under *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993). *Brecht* sets the standard for determining when a constitutional error, once found to exist, is reversible on collateral review. That standard is, again, the same as the standard the state court applied: whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 113 S. Ct. at 1722.

The Questions Presented in the Petition suggest that reliance on *Brecht* runs afoul of *Teague v. Lane*, 489 U.S. 288 (1989). In fact, *Teague* supports the retroactive application of *Brecht* to this case. *Teague* said that the Supreme Court would not enunciate a new rule of criminal procedure on collateral review unless it could be made applicable to all persons similarly situated. 489 U.S. at 316. For that reason it declined to rule on the issue that the petitioner sought to present in that case. The *Brecht* Court, on

the other hand, chose to enunciate a rule. Therefore, under *Teague*, the Court must have assumed that the rule would be applicable to all similarly situated persons. In fact, the Supreme Court in *Brecht* did not believe it was enunciating a "new rule" at all. When the petitioner argued that the Court was bound by prior decisions that assumed *Chapman* applied on collateral review, the Court responded that "since we have never squarely addressed the issue . . . we are free to address the issue on merits." *Brecht*, 113 S. Ct. at 1718.

Finally, the vice that the *Teague* court sought to avoid was the adoption of new rules of procedure which, if retroactive, would open the door for innumerable prisoners, whose convictions were long since final, to come into federal court and seek release or new trial on the basis of the new rule. This, of course, could be true only with respect to new rules that enlarge the procedural rights of the accused. The *Brecht* rule does not have that effect; it narrows the procedural rights of the accused.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

December 12, 1994

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. HENRY, Petitioner and Appellee, v. WAYNE ESTELLE, Warden, Respondent and Appellant.	No. 91-55691 (USDC Central Dist. No. CV 90-4064-RMT(K) (Filed Aug. 8, 1991)

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE ROBERT M. TAKASUGI

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a habeas corpus petitioner who is represented by counsel has fairly presented a federal constitutional claim to a state appellate court when he alleges a violation of state law, cites only state cases, invokes no constitutional principles and relies upon a state standard of harmless error reserved for non-constitutional claims.

2. Whether the admission of evidence, found to be error but harmless by a state appellate court, rendered petitioner's trial fundamentally unfair.

JURISDICTIONAL STATEMENT

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California pursuant to section 2254 of Title 28 of the United States Code. (ER. 119.)[1] On May 20, 1991, a judgment was entered granting the petition for writ of habeas corpus. (ER 231.) The notice of appeal was filed on June 13, 1991, qualifying the appeal as timely under Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF FACTS

A. Procedural Facts

Petitioner was charged with seven counts of child molestation. After a jury trial in the Superior Court of the State of California for the county of Ventura, petitioner was convicted of one count involving a boy named Andrew. (CT 1, 2, 169.) As to the additional counts, which involved another boy, petitioner was acquitted of one, and a mistrial was declared as to the other five. On November 29, 1988, petitioner was sentenced to six years in prison. (CT 205.)

Petitioner appealed his conviction to the California Court of Appeal. In its opinion, the Court of Appeal held that the trial court had erred under state law in admitting evidence of a prior accusation against petitioner, but found the error to be harmless. (ER 89-100.) Petitioner subsequently filed a petition for review in the California Supreme Court, which was denied. (ER 123.)

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[1] "ER" refers to Excerpts of Record; "CT" refers to Clerk's Transcript; "RT" refers to Reporter's Transcript.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. (ER 119.) On May 10, 1991 a magistrate judge recommended granting the petition. By order filed May 20, 1991, the District Court adopted the magistrate judge's recommendation. (ER 230.)

B. Facts of the Criminal Offense

Andrew was ten years old at the time of his testimony. He was then in the fourth grade. (RT 378.)

Andrew attended kindergarten and first and second grade at St. Paul's Church and Day School where he met appellant, who was the rector of the church and dean of the school. Andrew remembered one time when he went inside petitioner's office, but he could not remember how old he was. (RT 380.) He was sitting on a bench in Mrs. Ryan's (the principal's) office waiting for his parents. (RT 380-381.)

Petitioner called Andrew into his office. Petitioner closed the door behind them. No one else was present. Petitioner told Andrew to lie down on the couch and pull down his pants. (RT 381-382.) Petitioner touched him on his penis. (RT 382.) Andrew thought that the rubbing lasted about three minutes. Petitioner told him to pull up his pants and go back to the bench outside his office to wait for his parents. (RT 384.) School, which ended at noon, was over for the day. (RT 391.)

Andrew was not angry and did not know what had happened to him. He did not know whether petitioner had done something bad to him. (RT 385.) He did not

know why he did not tell his parents. (RT 395-386.) Andrew loved petitioner because he was nice (RT 386.) He thought petitioner was close to God. (RT 387.)

Elizabeth Ryan was principal of St. Paul's for 17 years. (RT 456.) She testified to the layout of petitioner's office. There was a couch sofa under a window with drapes. Petitioner generally kept the drapes closed. (RT 462-464.) There was a walkway for the students that went by the windows. The first and second graders used one walkway and third and fourth graders used the other. (RT 479.) The drapes were a close, thick net, and they were not lined. (RT 480.) It was easier to see out of petitioner's office when the drapes were closed than it was to see in. (RT 510.) Ms. Ryan remembered that sometimes his office would become hot and stuffy, but she did not recall ever seeking the drapes or windows open. (RT 481.) The preschool students were released from school at 11:30 and grades one through eight got out at ten to three. (RT 485.) Sometimes the office area would be busy at the noon hour but at other times Ms. Ryan would be alone. (RT 490-491.)

Ms. Ryan remembered an incident where she came out of petitioner's office and saw Andrew sitting on the bench outside his door. Petitioner called Andrew into his office and closed the door behind him. (RT 466.) It was about 11:45 a.m. and Andrew was waiting to be picked up by his parents from kindergarten. She thus concluded that the incident occurred in 1985. (RT 467.)

Ms. Ryan saw Andrew go into petitioner's office with the door closed behind him on one other occasion, when Andrew was in first grade. On this occasion, Andrew had been sent out from his classroom because he was having

difficulties. Petitioner took Andrew, who had taken his books with him, into his office. (RT 468-469.)

Ms. Ryan became more acquainted with Andrew than with other kindergartners because he was having difficulty in school. Andrew was open with her and she never know [sic] him to tell a lie. (RT 470-471.)

Tomoko Yeh attended St. Paul's Episcopal Church in Ventura on a regular basis. Her husband was vestry and both her children attended the school. (RT 397.) In April 1987, Judy Thomas, wife of the police chief, told her that petitioner was believed to have molested Andrew. (RT 398, 407.)

When Mr. Yeh confronted petitioner on April 30th, he stated that something had happened, but that it was a matter of interpretation. He denied molesting Andrew. (RT 402.) Petitioner seldom looked at their faces during the meeting. He looked at the ground and seemed nervous. (RT 400.) Her husband kept a notebook of these events because he was [sic] medical doctor and he feared that a large problem might be developing. (RT 401.)

Ms. Yeh became concerned for the welfare of her children. She wanted to ask petitioner to keep his door open at all times to protect the children. (RT 401, 413.) Ms. Yeh began to cry during the interview since she felt uncomfortable because petitioner was unable to look at them. (RT 402-403.) Mr. Yeh told petitioner, " You should leave medical exams up to medical profession." (RT 403.) Petitioner said during the conversation that he had had problems with the Walker family 20 years ago in Pomona. (RT 414.)

Tobias Yeh called the principal Betsy Ryan, Father Nyback in Pomona and an archdeacon at the Episcopalian diocese when he heard the allegations against petitioner from his wife. (RT 425.) He prepared a notebook of the events, believing the incident to be a serious matter. (RT 426.) They met with petitioner to request that he keep his office door open at all times. (RT 428.)

Petitioner first denied that he had molested Andrew when Dr. Yeh confronted him but then stated, "something happened, but it's been misinterpreted." (RT 429-430.) Petitioner also told him that he was going to meet with Andrew's father, Steve Walker, to tell him some things that he did not know about. (RT 441-442.)

Thomas Hackett, now a resident of New Hampshire, lived in Pomona, California, from 1962 until 1972. (RT 743-744.) His son Timothy, now 30 years old, attended St. Paul's Episcopal day school in Pomona from the third to the sixth grade where petitioner was the rector. (RT 744-745.)

In 1969 Mr. Hackett's son told him that petitioner had touched him. When Mr. Hackett confronted petitioner, he stated that he had been counseling his son for an emotional problem which caused him to grab himself when nervous. (RT 745.) Petitioner intimated that Tim was grabbing his penis. Tim's account indicated that petitioner had molested him. Petitioner stated that Tim had been mistaken, and that petitioner had not touched him. (RT 746-748.)

STANDARD OF REVIEW

A district court's grant of a petition for a writ of habeas corpus is reviewed *de novo*. (*Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986); *Reiger v. Christensen*, 789 F.2d 1425, 1427 (9th Cir. 1986).) District court findings on questions of law and mixed questions of law and fact are reviewed de novo. (*Herd v. Kincheloe*, 800 F.2d 1526, 1528 (9th Cir. 1986).)

ARGUMENT

I.

PETITIONER DID NOT RAISE A CONSTITUTIONAL CLAIM IN STATE COURT PROCEEDINGS AND THEREFORE FAILED TO EXHAUST HIS STATE REMEDIES

The issue in the present case is whether a habeas corpus petitioner may be said to have exhausted state remedies within the meaning of 28 U.S.C. section 2254 when he alleges a claim of deprivation of due process on habeas review after not invoking due process, or *any* constitutional considerations, in arguing evidence was inadmissible in state court. Appellant submits that a mere claim of error under state law, such as what petitioner contended in this case in state court, clearly constituted a failure to exhaust under section 2254. Consequently, the district court erred in concluding that the exhaustion requirement had been satisfied. The district court's error requires reversal.

Before a federal court may address any constitutional issue on a writ of habeas corpus, and because "federal habeas corpus is an extraordinary remedy", the petitioner

must have exhausted all state remedies with respect to that issue. (28 U.S.C. §2254(b), (c), (1988); *McQuery v. Blodgett*, 924 F.2d 829 (9th Cir. 1991).) Section 2254 (b) specifically provides that a habeas application "shall not be granted" unless the petitioner has exhausted the remedies available in state court. "Courts have therefore consistently held that any constitutional claim must have been 'fairly presented to the state court'." (*Gonzalez v. Sullivan*, 934 F.2d 419, *Pickard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971).) Because exhaustion is a prerequisite to a federal court's jurisdiction, it will even be addressed by the court *sua sponte* where the state has abandoned an exhaustion challenge (*McQueary* at p. 833, fn. 5.)

A petitioner has failed to exhaust his state remedies if he does not allege in state proceedings *the federal legal theory* on which his claim is based. (*Anderson v. Harless*, 459 U.S. 4, 6 (1982).)

As the United States Supreme Court stated in *Harless:*

> "In *Pickard v. Connor*, 404 U.S. 270 (1971), we made clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim. *Id.*, at 276-277. It is not enough that all the facts necessary to support the federal claim were before the state courts, *Id.*, at 277, or that a somewhat similar state-law claim was made. See, e.g., *Gayle v. LeFevre*, 613 F.2d 21 (CA2 1980); *Paullet v. Howard*, 634 F.2d 117, 119-120 (CA3 1980); *Wilks v. Israel*, 627 F.2d 32, 37-38 (CA7), cert. denied, 449 U.S. 1086 (1980); *Conner v. Auger*, 595 F.2d 407, 413 (CA8),

> cert. denied, 444 U.S. 851 (1979). In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim. *Pickard, supra,* at 275, 277-278. Cf. *Ross v. Lundy,* 455 U.S. 509, 518 (1982)."

In the present case the petitioner, a state prisoner, filed an appeal in the California Court of Appeal following his conviction for child molestation. (ER 23.) Petitioner has been represented by private counsel at all times. (See *Gonzalez* at 423.)[2]

In his appeal to the California Court of Appeal petitioner claimed the trial court had erred under state law in admitting evidence of a prior accusation against him. This evidence consisted of the testimony of Thomas Hackett. (See pp. 6-7, *ante*.) Petitioner relied exclusively

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[2] While habeas petitions prepared by *pro se* litigants may be held to less stringent standards, formal pleadings drafted by lawyers are not. (*Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66, L.Ed.2d (1980); *Terranova v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988); *Eldrige v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).) There is no justification in this case to construe petitioner's state court pleadings more liberally than petitioner presented them. Throughout state appellate and federal habeas proceedings petitioner has been represented by the law firm of O'Melveny and Myers. On his state appeal petitioner was represented by the O'Melveny firm in association with attorney Dennis Fischer. Mr. Fischer is the author of the California Continuing Education of the Bar's practice guide entitled "Appeals and Writs in Criminal Cases." (Copyright 1982 by the Regents of the University of California.) Last Term Mr. Fischer represented a habeas petitioner before the United States Supreme Court. (*Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990).)

on state cases and the state Constitution. He did not invoke the federal Constitution and argued only a violation of state law. (ER 39-45.) Specifically, he did not contend the alleged error in the admission of evidence was of constitutional dimension as a due process violation.[3] This much has been conceded by petitioner. (ER 139.)

On the contrary, petitioner specifically maintained that the applicable standard of prejudice was the test reserved for errors of state law that of *People v. Watson*, 46 Cal.2d 818, 835-836, 299 P.2d 243 (1956) *cert den.*, 355 U.S. 846, 78 S.Ct. 70 (1957); ER 53, 109.)

Petitioner thereby disavowed any claim of federal constitutional error, since such a claim requires the clearly established standard of *Chapman v. California*, 386 U.S. 18, 24, 875, S.Ct. 824, 828, 17 L.Ed 2d 205 (1967).

A crucial distinction between *Watson* and *Chapman* is that a finding of error under state law requires a state appellate court to decide only whether it is reasonably probable the result would have been different absent the error (*Watson*), whereas a finding of constitutional error requires a finding that the error was harmless beyond a reasonable doubt if the conviction is to be affirmed. (*Chapman.*)[4]

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[3] Compare *Terronova v. Kincheloe, supra,* 852 F.2d 424, 429 (9th Cir. 1988) [Petitioner, whose *pro se* petition was liberally construed, made at least passing reference to federal constitution].

[4] In *West v. Wright*, 931 F.2d 262, 265 (1991), the Fourth Circuit found that a habeas petitioner had exhausted a

Further, the two standards are *so* substantially *different* that when determining the appropriate standard of prejudice in a particular case the California Supreme Court invariably decides whether the standard is *Watson*, in which case the defendant bears the burden of proving probable prejudice rather than *Chapman*, which places the burden on the state to show the error was harmless beyond a reasonable doubt. (*See, e.g., People v. Brown*, 46 Cal.3d 432; 250 Cal.Rptr. 604, 758 P.2d 1135 (1988); *People v. Olde*, 45 Cal.3d 386, 414-415, 247 Cal.Rptr. 137, 754 P.2d 184 (1988); *People v. Lee*, 43 Cal.3d 666, 671-676, 238 Cal.Rptr. 406, 738 P.2d 752 (1987); Traynor, *the Riddle of Harmless Error* (1970).)

Petitioner's understanding and awareness of the significance of the differing standards of prejudice is evident since he phrased an unrelated contention in his state appeal as a violation "of his due process right." (ER 49-50.)

In affirming petitioner's conviction, the state appellate court applied the less stringent standard which petitioner proposed – *Watson* – and concluded the error was not prejudicial. (ER 95.)

It is not enough that petitioner now relies on the same factual allegations he made in state court; it is the sufficiency of petitioner's legal theory which has impermissibly changed.

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sufficiency of the evidence claim because, *inter alia*, his state court challenge was not "the 'more -likely - than-not" standard of rationality developed in the line of cases . . . rather than the more stringent 'beyond a reasonable doubt' standard for assessing the sufficiency of particular evidence. . . . "

"If, in state court, a petitioner has (1) cited a specific constitutional provision, (2) relied on federal constitutional precedent, or (3) claimed a determinate right that is constitutionally protected he will have employed a mechanism which significantly eases any doubt that the state courts have been alerted to the federal issues." (*Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989).) Petitioner did none of these things, the rubric of 'fair trial' being insufficiently specific to satisfy the exhaustion doctrine. (But cf. *Nix v. Whiteside*, 475 U.S. 157, 163, n. 3 (1986).)

"[W]e do not imply that [petitioner] could have raised the [due process] claim only by citing 'book and verse on the federal constitution.' " (*Pickard v. Connor, supra*, 404 U.S. at 278.) It is "the substance" of the federal claim that must first be presented to the state court, (*ibid*), and "in such a manner that it must have been likely to alert the court to the claim's federal nature." (*Nadworny v. Fair, supra*, 872 F.2d at 1097.)

"The appropriate focus, therefore, centers on the likelihood that the presentation in state court alerted that tribunal to the claim's federal quality and approximate contours. The inquiry, in our view, is foremost a question of probability." (*Id.* at 1098.)

In every court, petitioner has complained about the same evidence for the same reasons – too little relevance, too much prejudice. His theme has been that the evidence tended to prove his general criminal propensity rather than his actual guilt. In this important respect, petitioner's claims here and in the state courts may have been

"functionally identical."[5] (See *Nadworny v. Fair, supra,* 872 F.2d at 1099.) To presume that a "functionally identical" state claim would alert California jurists to its federal constitutional implications would be unfair to state judges and to state prisoners alike.

Nor can petitioner contend that the evidence in question by its nature implicated due process concerns even absent petitioner's explicitly invoking a due process claim. Admission in state criminal proceedings of evidence of prior conduct typically does not present a federal question. (*Cessasa v. Nelson,* 452 F.2d 1083, 1084-1085 (9th Cir. 1981).) Further, the harmless error analysis uti lized by the Ninth Circuit parallels *Watson* – error is harmless if it is more probable than not that the prejudice resulting from the error did not materially affect the verdict. (*United States v. Echavarria-Olarte,* 904 F.2d 1391, 1398 (9th Cir. 1990).)

In the presence of persuasive evidence that the state tribunal was misled as to the claim's federal character, speculation must yield to the comity interests underlying the exhaustion doctrine. The California court was only to find asserted state law evidentiary error harmless under a

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[5] Federal courts have condemned evidence of an accused's general predisposition toward crime, e.g., *United States v. Fox,* 473 F.2d 131, 134 (D.C. Cir. 1972), but this rule does not now enjoy constitutional status, *Spencer v. Texas,* 385 U.S. 554, 563-564 (1966); esp. 573-574 (Warren C.J. concurring/and dis.), and may not acquire such dignity in a federal habeas corpus case. (*Teague v. Lane,* 489 U.S. 288 (1989).) This tells nothing about whether "reasonable [state] jurists would likely have been alerted to the federal nature of the claim," however. (See *Nadworny v. Fair, supra,* 872 F.2d at 1103.)

standard more forgiving than that of *Chapman v. California, supra,* and any ambiguity in claiming federal error before the state court should be resolved against petitioner.

Despite the foregoing, the Magistrate Judge found that petitioner had "impliedly" exhausted his state remedies (ER 217), and the District Court adopted the Magistrate Judge's report and recommendation. (ER 230.)

In his report, the Magistrate Judge states that petitioner should not be denied habeas relief "simply because he failed to cite 'book and verse on the federal Constitution.' " (*Daugherty v. Gladden,* 257 F.2d 750, 758 (9th Cir. 1958); ER 217.)

Appellant submits the doctrine of exhaustion has advanced considerably since *Daugherty.* (See *Anderson v. Harless, supra; Pickard v. Connor, supra.*) More importantly, appellant submits it is hardly oppressive to require a habeas corpus petitioner who is represented by counsel to identify how an error of state law constituted a constitutional violation, particularly since admission in state criminal proceedings of prior conduct typically do not present a federal question. (*Cassasa v. Nelson, supra,* 452 F.2d 1083; see also *Petrucelli v. Coombe,* 735 F.2d 684, 689, ("Federal judges will not presume that state judges are clairvoyant.").)

In *Anderson v. Harless, supra,* the defendant had argued on his state appeal that the trial court's instructions on the element of malice was erroneous and he cited state law. "Not surprisingly, the Michigan Court of

Appeals interpreted respondent's claim as being predicated on state law . . . and analyzed it accordingly. . . . " (*Id.*)

The same is true in the present case. Petitioner relied on state law and, not surprisingly, the California Court of Appeal interpreted petitioner's claim as based on state law. The court found error under state law. Applying the appropriate standard of prejudice, the California Court of Appeal affirmed petitioner's conviction. (ER 95.)

In *Harless*, as here, the Court of Appeals (here the District Court) concluded the constitutional ramifications of the defendant's arguments were self evident and his reliance on state law "sufficient to present the state courts with the substance of his due process challenge. . . . " (*Id.*)

The Supreme Court in *Harless* noted "it is plain from the record that this constitutional argument was never presented to, or considered by, the Michigan Courts." (*Id.*)

The same is true here. While the due process ramifications of petitioner's claims may be apparent to the District Court, they were not shared by petitioner's counsel since they were never previously alleged, nor were due process ramifications apparent to the California Court of Appeal when it applied the standard of error reserved for violations of state law.[6]

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[6] In *McQueary v. Blodgett, supra*, 924 F.2d 529, 531, 533 and fns. 1 and 5, this court held that a habeas petitioner who challenged provisions of his sentence had adequately presented the underlying facts and the substance of his argument to the state courts. Appellant submits the same cannot be said for the instant case because a challenge to the admission of evidence must include an allegation of due process in order to trigger application of a federal-based standard of harmless error. Indeed, the *legal* premise of a *federal*-based claim is that asserted error is not harmless beyond a reasonable doubt.

The Magistrate Judge at least impliedly recognized merit in appellant's assertion. On November 15, 1990 the magistrate judge ordered oral argument in this case and argument was heard on December 14, 1990. During the argument, the magistrate judge expressly invited petitioner's counsel to file a petition for a writ of habeas corpus in the California Supreme Court, thereby precluding any claim by respondent that petitioner had failed to exhaust state remedies. (ER 195-196.) Petitioner declined to do so. Appellant submits the honorable magistrate judge's recommendation is a recognition of the reasonableness of appellant's assertion.

A review of the record in this case makes clear that a constitutional claim of deprivation of due process was never made to the California Court of Appeal, nor was such a claim evident from a review of petitioner's pleadings in state court. (*Cassasa v. Nelson, supra.*) On the contrary, petitioner presented an issue exactly as framed by his distinguished counsel; a claim of error under state law. Accordingly, the California Court of Appeal considered the issue as one of state law, not involving constitutional considerations.

As a result, the courts of California were never given a fair opportunity to review the merits of the federal legal theory which petitioner presented to the district court. Because petitioner did not raise the theory, the courts of

California were also never given the opportunity to apply the standard of prejudice reserved for constitutional claims.

Instead, petitioner presented a state law claim in state court and, unsuccessful there, he subsequently "federalized" his claim. Since he therefore failed to exhaust his state remedies, the petition should be dismissed and the district court's decision should be reversed.

II.

THERE WAS NO FEDERAL DUE PROCESS VIOLATION

Federal courts do not review state law errors. (*Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Gryger v. Burke*, 334 U.S. 728, 731 (1948).) Thus, "failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief." A state prisoner nevertheless may be entitled to federal habeas relief if his trial was "so fundamentally unfair as to deny him due process." (*Donnelly v. DeCristoforo, supra*, 416 U.S. at 645.) The Supreme Court has cautioned that the Due Process Clause has "limited operation" and the "fundamental fairness" is "very narrowly" drawn.[7] (*Dowling v. United States*, 110 S.Ct. 668, 674 (1990).)

At the margins of "fundamental fairness," "constitutional line drawing . . . is necessarily imprecise." (*Donnelly v. DeCristoforo, supra*, 416 U.S. at 645.) Not

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[7] The Supreme Court may well elaborate this point in *McGuire v. Estelle*, 902 F.2d 749 (9th Cir. 1990), cert. granted, February 25, 1991, *Estelle v. McGuire* No. 90-1074.

surprisingly then, claims like petitioner's have produced many due process rubrics, but no rule. Guidance is found in *Moore v. Illinois*, 408 U.S. 786, however. In *Moore*, a fully loaded saw-off [sic] 16-gauge shotgun found in a car occupied by the defendant six months after the charged homicide was admitted into evidence over objection. The state conceded that the murder weapon was a 12-gauge shotgun, but the trial court admitted the 16-gauge weapon under a state rule permitting evidence of a weapon "suitable for the commission of the crime charged . . . even though there is no showing that it was the actual weapon used." (*Id.*, at 799.) The prosecutor argued to the jury that the 16-gauge shotgun, while not the murder weapon, did show that defendant was one of the "the kind of people that use shotguns." (*Ibid.*) In short, the State proved that the defendant was in constructive possession of an unlawful weapon that was designed to terrorize or kill people, but was not used in the crime charged. Lest the point escape the jury, the prosecutor made clear that the purpose of this evidence was to show the defendant's general propensity to commit crime.

In the United States Supreme Court, Moore insisted that he had been denied Fourteenth Amendment due process. The Court disagreed:

> "[W]e cannot say that the presentation of the shotgun was so irrelevant or so inflammatory that Moore was denied a fair trial. The case is not federally reversible on this ground." (*Id.*, at 800.)

Moore's holding may be explained on alternative grounds: (1) due process is violated by the admission of

prosecution evidence that has no probative value, but is so prejudicial that it is reasonably probable that exclusion would have produced a more favorable verdict; (2) due process is violated by the admission of state's evidence that has slight probative value, but is so prejudicial that there is no reasonable possibility, that it did not affect the verdict.

The Ninth Circuit has embraced the first and narrower of these two interpretations of due process:

> "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a far [sic] trial.' " (*Jammal v. Van De Kamp*, 926 F.2d at 920 (footnote deleted).)

Jammal is consistent with California rules of evidence, which hold that,

> "Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury. [Citation.] The weight of such evidence is for the jury." (*People v. Slocum*, 52 Cal.App.3d 867, 891, 125 Cal.Rptr. 442 (1975), cert. denied, 426 U.S. 924 (1978.) "[T]he trial court is vested with wide discretion in determining relevance under this standard." (*People v. Green*, 27 Cal.3d 1, 19, 609 P.2d 468 (1980).)

Apart from the charge as to which the challenged evidence was admitted, petitioner was charged with six

other counts relating to another child. Yet the jury acquitted petitioner of one count and deadlocked in various combinations as to the others. (ER 89.) Petitioner's claim that the jury was swayed by the evidence is therefore unavailing. The jury already knew petitioner was charged, in numerous counts, with molesting another child. They nevertheless carefully analyzed the evidence and considered each witness individually. The California Court of Appeal specifically found that the fact of an acquittal and a deadlock as to the remaining charges "indicates they continued to evaluate the evidence without being swayed by prejudice." (ER 95.)

It is also significant, in the due process context, that this was the only evidentiary error raised by petitioner. This case is therefore unlike other cases in which the cumulative effect of inadmissible evidence – often coupled with an erroneous instruction – justified reversal. (See, e.g., *McGuire v. Estelle*, 902 F.2d 749, 755 (9th Cir. 1990); see also *Jammal v. Van de Kamp* (1991) 926 F.2d 918; 1991 U.S. App. Lexis 3054 (No. 89-16377).)

CONCLUSION

Accordingly, for the reasons stated, appellant respectfully asks that the judgment be reversed.

DATED: August 7, 1991.

Respectfully submitted,

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